Los Angeles Review, Law Printers, 120 So. Spring St., Los Angeles. TU 1377

FILED
OCT 13 1932

FILE COPY

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In the Supreme Court of the United States

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JIMMIE BURNS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

No opinion was rendered by the District Court. The opinion of the Circuit Court of Appeals (R. 73–90) is reported in 59 F. (2d) 721.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 20, 1932. (R. 90–91.) The petition for certiorari was filed September 19, 1932. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the District Court erred in revoking petitioner's probation and remanding him to the penitentiary to serve a suspended sentence.

STATUTE INVOLVED

The applicable provisions of the Probation Act (Act of March 4, 1925, c. 521, 43 Stat. 1259; U. S. C., Title 18, Secs. 724, 725, 727) are set forth in the appendix to petitioner's brief and are therefore not repeated here.

STATEMENT

The petitioner pleaded guilty (R. 17) to all three counts of a criminal indictment filed in the District Court for the Southern District of California (R. 3–8). He was sentenced on the first count to imprisonment for one year in the Los Angeles County jail, and on the second count to pay a fine of $2,000. On the third count he was sentenced to imprisonment for five years in the penitentiary, but the judgment provided that (R. 9–10)—

> execution of said sentence of imprisonment on the third count is suspended during such time as the defendant reports regularly every three months in writing, beginning with this date, to the Federal Probation Officer of this court; during which time he entirely refrains from any violation of any law with the possible exception of parking and traffic ordinances, and in all respects conduct himself as a law-abiding citizen. In case of the

> violation of the terms of probation, the defendant will be brought before the Court and sentenced. Probation is granted for a period of five years.

The judgment was entered May 4, 1931, and petitioner was on that day committed to the Los Angeles County jail to serve the one-year sentence. (R. 8, 12.) On January 21, 1932, he was brought before the court for a hearing on the question whether his probation on the third count should be revoked. The court ordered an hour's recess to enable petitioner to procure the services of an attorney. The hearing being resumed, counsel for petitioner stated that he did not know what the issues involved were and requested a continuance in order that he might have an opportunity to "inquire into the situation." (R. 19–21.) The request was denied, the court saying (R. 21–22):

> The newspapers for several days have been full of accounts reflecting, in a most serious measure and degree, upon this defendant who pleaded guilty to certain offenses, was given a jail sentence and also sentenced to a term in the Federal Penitentiary, which was suspended during the period of his good behavior. This is an extremely simple matter that the Court has before it. The question is whether he has violated the terms of his probation. The matter was brought to the attention of the Court by the United States attorney's office, whereupon the Court ordered that the defendant be

> brought before the court. We are here now to investigate. I don't feel that it is a matter in the nature of a trial, and, inasmuch as the matter has been brewing for several days, and the defendant himself might have anticipated such a proceeding, I see no harm in going ahead with the proceedings necessary to determine the question before the Court.

No exception was taken to this ruling of the court.

The Government called three witnesses. A. P. Rumburg, a special agent of the Bureau of Prohibition, testified that, having received information that petitioner was permitted to leave the county jail for a full day at a time, he had caused an investigation to be made of the jail records to ascertain the dates and length of petitioner's absences from the jail. A copy of the jail record thereupon produced by the witness was admitted in evidence as an exhibit. (R. 22–23.) It showed that on fifteen days between May 10 and August 18, inclusive, petitioner was absent from the jail for periods ranging from three hours and fifty-eight minutes to twelve hours and thirty-six minutes; that during these absences he was in the custody of one "Lessner," or one "Jones" (Deputy United States Marshals), and that the absences were authorized by Judge James, a United States District Judge. (R. 24.) The witness further testified on direct and cross-examination that at his request one of the agents had talked to Judge James and had ascer-

tained that the latter had in May granted authority for taking petitioner to the dentist; that the witness had interviewed Lessner, who exhibited to him an order authorizing petitioner to be taken to the dentist; that the order was a general one, but the witness could not say whether it was limited to a single visit or was for general treatment (R. 27–28); that on August 18, 1931, at 5.45 o'clock p. m., the witness telephoned petitioner's home and asked for Lessner; that petitioner answered the call and said that Lessner was there but was in the bathroom and could not come to the telephone; that the witness, accompanied by another agent, thereupon proceeded to petitioner's home, where they arrived at 6.00 o'clock p. m. and were admitted by petitioner, who was "without a coat or hat and had on bedroom slippers"; that petitioner told the agents that Lessner was in the bathroom and would be out shortly; that in about ten minutes Lessner entered, apparently through a back door, with his hat and coat on, bringing "a couple of packages of cigarettes" (R. 25–26, 29–30); that the agents were there until 6.20 o'clock p. m. (R. 25) and left before petitioner and Lessner (R. 28).

After cross-examination of the witness had proceeded at some length it was interrupted by the trial judge, who personally conducted an examination of the witness. At the conclusion thereof the judge refused to permit further cross-exmination, saying "We are not conducting a trial." An ex-

ception to this action of the court was noted. (R. 30.)

R. S. Zimmerman, clerk of the court, testified that in the usual course of procedure the granting of authority for the release of a prisoner from the county jail would be noted on his records, but that his records failed to disclose that any such authority had been granted as to petitioner. (R. 30–31.)[1]

Taking the stand in his own behalf petitioner, upon cross-examination, gave the following testimony (R. 44–45):

> Q. By Mr. REDWINE. Now, the record shows on May 30th, you left the jail on May 30th, at 10 o'clock A. M. and did not return until 9.06 P. M. You were not in his office all of that time?
>
> A. No, sir; I don't remember the incident, but I don't suppose I was.
>
> Q. What did you do?
>
> A. Well, I might have had something to eat.
>
> Q. What else did you do?
>
> A. That is all.
>
> Q. Well, what were you doing until 9.06 P. M. in the evening?

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[1] Considerable testimony also appears in the record with reference to the alleged obtaining by petitioner from a fellow prisoner of a false statement contradicting a prior statement that the latter had given in connection with a certain kidnapping case (R. 32–40), but as this testimony was not made the basis for revoking probation it is not here discussed (R. 49).

A. Well, listening to the radio; something like that.

Q. Where were you listening to the radio?

A. At my home.

Q. How many times did you go to your home when you were really supposed to be going to the dentist?

A. Well, I really couldn't tell you; just quite a few times.

Q. Most of the time?

A. Pretty near.

On redirect examination petitioner stated that when he was out of the jail he asked to be taken home to get a change of clothes; that "usually each time he went to the house he went for a change of linen." (R. 48.)

At the conclusion of petitioner's testimony his counsel requested an opportunity to present further evidence. The request was denied, the court saying: "I am not prepared to have a hearing of this case that will run into the proportions of a criminal trial." (R. 48–49.) In rendering its decision, to which an exception was taken, the court stated, in part (R. 49–50):

> Now, gentlemen, there is enough obviously before this court to show that the spirit of the probation was not in any sense complied with. The idea that one person sentenced to the county jail should over a period of 3 months, a little bit more than 3 months, be taken out for on 15 different occasions from 10 o'clock in the morning until 9 o'clock at

night, oftentimes, that of itself is something that should bring the blush of shame to anybody entrusted with the execution of the law.

* * * * *

Upon appeal the order of the District Court was affirmed. (R. 90–91.)

ARGUMENT

I

The petitioner contends that his probation was revoked "summarily," and without any showing that he had violated the order of probation. We submit that the contention is without merit.

On the first count of the indictment petitioner was sentenced to imprisonment in the county jail for one year. On the third count he was sentenced to imprisonment in the penitentiary for five years, but execution of the sentence on the latter count was suspended and he was placed on probation for five years. One of the conditions of the probation was that petitioner should "in all respects conduct himself as a law-abiding citizen." (R. 9–10.) Bearing in mind the fact that the first year of the probationary period was to be spent in jail, we submit that the petitioner did not conduct himself as "a law-abiding citizen" when the evidence shows that in utter disregard of the purpose of his commitment and in flagrant abuse of the obvious intent of a general order permitting him to be taken to the dentist for treatment, he remained away from the jail on fifteen occasions during a three months'

interval for periods ranging from four to twelve and a half hours, most of which time was spent not with the dentist but in enjoying the comforts of his home.

Petitioner contends that the conditions of his probation were not breached because no law was violated. In other words, he asserts that the condition that he should conduct himself as a law-abiding citizen has the same meaning as the preceding condition in the probation order that the petitioner should refrain "from any violation of any law." As applied to a man who was to spend the first year of his probationary period in jail, we do not believe that such a construction of the probationary order is sound. The requirement that the petitioner should "in all respects conduct himself as a law-abiding citizen" was essentially one of good conduct. Prisoners have little opportunity to violate criminal laws, and in the light of this fact it seems clear that the District Judge, as indicated at the hearing on the revocation of probation (R. 49), intended by the order of probation that sentence should be suspended only so long as the petitioner's behavior was good.

To protect the public as well as the convict, much latitude must necessarily be allowed a District Judge in administering the Probation Act. We know of no reported case in which an order revoking probation has been reversed. If the condition of probation in question has the broader meaning

which the District Judge evidently intended it to have, there was clearly a breach of such condition, for, as was said by the court below (R. 84), the petitioner "had taken advantage of a general permit to carry out his own purposes quite independently of the basis and theory upon which the order was given." His conduct was clearly not consistent with any reasonable conception of the idea of good behavior, even for one in jail.

But even if the condition in question be given the stricter interpretation asserted by petitioner, we submit that there was a breach of the condition. Petitioner's abuse of the limited privilege conferred upon him of going to the dentist for treatment could not have occurred without the connivance of those who were charged with his custody. These officers could have been punished for contempt of court in disregarding the manifest intent of the order of commitment. If the petitioner was not equally guilty of contempt he was clearly a party to the flouting of the mandate of the commitment by the officers. In *United States* v. *Hoffman*, 13 F. (2d) 269, 272, affirmed, 13 F. (2d) 278, 280 (C. C. A. 7th), the court held under similar circumstances that the prisoner could be charged with conspiring with his custodians to commit a violation of Section 268 of the Judicial Code (U. S. C., Title 28, Sec. 385), which provides for the punishment of contempts of court. The proof in the instant case shows active cooperation by at least one

of the petitioner's custodians in the abuse by petitioner of the limited privilege accorded him to visit the dentist. (R. 25–26.)

It would thus seem that petitioner was guilty of a violation of law which constituted a clear breach either of the condition that he should refrain "from any violation of any law" or of the condition that he should "in all respects conduct himself as a law-abiding citizen." It is not necessary as a prerequisite to the revocation of probation that the probationer be convicted of an offense, but only that the proof shall be such as to satisfy the District Judge that an offense has been committed. See *Campbell* v. *Aderhold,* 36 F. (2d) 366 (N. D. Ga.).

While the courts below evidently based their decision on the ground that probation may be revoked, in the exercise of a sound judicial discretion, whenever a showing is made that the granting of probation has failed to accomplish its purpose, a doctrine which appears not only sound but which is supported by the decided weight of authority (see R. 86–89), the judgment of the court below may, we submit, be supported upon the ground that there was in the instant case a breach of the conditions upon which probation was granted. If this be true, there is obviously no conflict between the instant case and that of *Hollandsworth* v. *United States,* 34 F. (2d) 423 (C. C. A. 4th), upon which petitioner relies. While in that case the court expressed the view that probation may be revoked only where

one of the conditions specified in the order granting probation has been infringed, it sustained an order revoking probation on the ground that the conditions of probation had not been met. Although the opinions in the instant case and in the case cited seem to contain conflicting views as to the meaning of the probation laws, there is plainly no conflict of decisions, since revocation of probation was affirmed in both cases.

II

Petitioner also contends that it is essential to a lawful revocation of probation that the probationer be given notice in advance of hearing of the specific charges against him. While this argument finds support in a statement appearing in the opinion in the *Hollandsworth case, supra,* such statement was obviously dicta, as there was no question of notice involved in that case. Not only is there nothing in the Probation Act requiring such notice but there are provisions in the Act which indicate that notice is unnecessary. For example, in Section 2 of the Act it is provided (Appendix to Petitioner's Brief, p. 2) that—

> At any time within the probation period the probation officer may arrest the probationer without a warrant, or the court may issue a warrant for his arrest. Thereupon such probationer shall *forthwith* be taken before the court. (Italics ours.)

But in any event we do not believe that the question is one which this Court is required to decide.

The question was originally raised by a motion for continuance. (R. 20–21.) This motion was denied (R. 22) but no exception was taken. While this Court undoubtedly has the power in a criminal case to disregard the lack of an exception where manifest injustice would result, this is not such a case. Petitioner pleaded guilty to the offense as to which execution of sentence was suspended, and the criminal trial is over. He is admittedly guilty of a flagrant abuse of the limited privilege extended him as a prisoner and deserves no special consideration.

CONCLUSION

The probation was lawfully revoked after a fair hearing. There is, we submit, no conflict of decisions. The petition should be denied.

Respectfully submitted.

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OCTOBER, 1932.

U. S. GOVERNMENT PRINTING OFFICE: 1932